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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

REPLY BRIEF OF APPELLANT MARK H. ORING

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REPLY BRIEF OF APPELLANT MARK H. ORING

I.

INTRODUCTION

Appellant, Mark H. Oring, has been disciplined for presenting a testimonial advertisement which was never found to be false, misleading or deceptive. In fact, the State Bar stipulated that the advertisement was true. The basis for discipline was a presumption that testimonial advertising is false, misleading or deceptive. Under this Court's prior decisions, such a presumption placing the burden on the speaker to prove the protected nature of the speech, and effectively banning any testimonial advertising, is unconstitutional.

The California State Bar, in its brief, argues that this presumption is constitutional and, in any event, Appellant's advertising is misleading. As we shall demonstrate, if this Court were to accept the State Bar's argument in this case, it

> "would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. . . .[R]ecent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

The State Bar's brief grossly distorts the legal and factual issues of his case and is replete with numerous

unsupported contentions. Among these distortions are the following: The State Bar contends that Oring's advertisement is misleading, but it ignores the advertisement as a whole, including the fact that the advertisement mentions that the *new and different* recovery was specifically dependant upon the insurance company's *"constant" harassment;* thus, the State Bar misstates and omits certain portions of the advertisement which make it complete and *nondeceptive.* It contends that experience has shown testimonial advertising to be misleading; yet, it fails to provide even a scintilla of *evidence* demonstrating this contention. Brief of Appellee, p. 38.

The State Bar argues that the Federal Trade Commission has recognized that testimonial advertising requires certain restrictions but *ignores the fact that the burden of proving that testimonials are misleading has always been, and still is, on the F.T.C.*

The State Bar fails to even address the issue concerning the chilling effect of the presumption which places the burden of proof upon the accused attorney to demonstrate that his testimonial advertisement is not false, misleading or deceptive. It fails to address the fact that, under the presumption, if the accused attorney proves that it is equally likely that his advertisement is not false, misleading or deceptive (i.e., even if the advertisement is shown to be false, misleading or deceptive), *he will be disciplined.*[1]

The State Bar contends that "[i]f the advertisement is indeed truthful, free of deception and is not harassing, it is a simple matter for the advertising lawyer to so demonstrate." Brief of Appellee, pp. 62-63. It further contends

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[1] This contention is especially important here, where the advertisement was stipulated to be truthful and was never found to be misleading.

that "[t]he obvious and appropriate rebuttal to the presumption regarding testimonials is the testimonial itself: Is it truthful? Is sufficiently complete information included? Is misleading or deceptive material excluded? *It is either deceptive or not."* Brief or Appellee, pp. 68-69; emphasis added. Yet, later, the State Bar takes a *completely contrary position,* stating that "[t]he burden is particularly fair and appropriate, since *in the final analysis, only the lawyer is in a position to demonstrate the truthful, nondeceptive nature of his or her own ad."* Brief of Appellee, p. 96; emphasis added. How could such a "simple matter," which can be proven from the advertisement alone, be demonstrated only by the accused lawyer? Why should the State Bar be relieved of the burden of proving such a "simple matter" when First Amendment rights are at stake?

The State Bar contends that the presumption at issue here is "the least extensive restriction necessary to serve the State Bar's interest in protecting against misleading lawyer advertising." (Brief of Appellee, p. 72). Yet it has proposed a new standard which places the burden of proving that a testimonial is misleading upon the Bar so long as the testimonial "also contains an express disclaimer such as 'this testimonial does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter' "? (Joint Appendix, p. 10). The proposed standard is certainly less burdensome than the standard now in effect and, at the very least, the proposal constitutes an implicit acknowledgment that the Bar's regulatory goals can be met by a less restrictive regulation.

The State Bar contends that Appellant Oring "clearly sought to take advantage of [the illiterate and functionally illiterate] in advancing his own pecuniary gain." (Brief of Appellee, pp. 96-97). *This statement is wholly unsupported by the record or any reasonable inference therefrom.* The record is devoid of any consumer complaints against Appellant Oring and, in fact, there were none. (Brief of Appellant, p. 7).

Finally, even assuming, *arguendo*, the State Bar were correct in all its contentions, the advertisement, itself, caused no harm and in fact benefited the public. Unlike certain advertisements,[2] this advertisement did not propose a purchase. Rather, it was an invitation to come into the office for a free consultation.[3] Studies indicate that existing sources of information about the availability of legal services are insufficient. Shall we continue to keep the public in the dark?

II.

APPELLANT ORING'S TESTIMONIAL IS TRUTHFUL AND NONDECEPTIVE.

Sharon S.'s statements, the basis for Appellant Oring's discipline, consisted, in substance, of the following remarks which were stipulated by the State Bar as *truthful*: Sharon S. was *rear ended* on the freeway, and *her*

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[2] For example, a soap testimonial proposes a purchase of soap. If the advertisement is successful, a consumer will go to a supermarket and make a purchase based on the advertisement alone.

[3] Of course, if any misstatements occurred at that time, the attorney would be subject to discipline. But this would be the case whether the client came to the office because of advertising or because of referral or by any other manner.

medical bills were piling up. The insurance company involved was *"giving me a hard time, constantly harassing me, just all in all gave me a bad time."* An attorney, who did not take cases that might go to trial, recommended her to Grey and Oring, who took the case immediately. The case ended up in court and Sharon got a nice award of money. Then, Grey and Oring telephoned her. *They had not liked the way the insurance company had treated her* and wanted to take the insurance company to trial because of this. Because of this, the insurance company offered Sharon S. an additional settlement.[4]

The State Bar contends that "these statements comprise a representation of quality and, as such, are misleading." Brief of Appellee, p. 35. Yet, these statements are devoid of any hyperbole, any laudatory adjectives or any statements of the amount recovered. The advertisement does not utilize objectionable subjective terms such as stating that Grey and Oring are "experts," "highly qualified," or "competent" in the field of personal injury or bad faith litigation. *Cf. Spencer v. Honorable Justices of Supreme Court of Pennsylvania*, 579 F.Supp. 880, 887 (1984). Rather, the advertisement utilizes an actual, *objective*, and admittedly truthful fact situation which was properly handled by Grey and Oring. *Id.* at 888.

Appellant's advertisement simply opens the channel of communications to the public and, thus, serves the public's best interest. *See Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557. It informs the public of the fact that if an insurance company

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[4] The advertisement went on to mention a telephone number to call and stated that there would be no charge for a consultation.

harasses a member of the public, it could be held liable to that individual. While the advertisement admittedly fails to mention "the term 'bad faith' " (Brief of Appellee, p. 76), the use of such an esoteric legal term would be more confusing to the public than the use of the *factual description of such term, i.e., harassment. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 631 (1985) [no mention of the term "negligence" in advertisement, but mention of *injuries which were, in fact, caused by Dalkon Shield*].[5]

The State Bar's contentions questioning the use of the term "nice award" (Brief of Appellee, pp. 80-81, asking "what is a nice award?") is contrary to the State Bar's explicit reasons for implementing the presumption at issue. In recommending the adoption of the presumption that testimonials are misleading, the State Bar Committee Report to its Board of Governors stated:

> "Advertising of . . . large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high . . . " (State Bar Motion to Dismiss or Affirm, p. 22).

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[5] Further, the State Bar's unsupported assertion that a cause of action for bad faith "is a far more esoteric and unfamiliar matter" and is unlikely to be present in any great number of automobile accidents (Brief of Appellee, p. 79) is contrary to authority. As demonstrated in Appellant's Brief, p. 32, to date, there have been *hundreds of appellate court decisions* regarding bad faith issues. In any event, even if the State Bar's arguments were correct, should advertising be barred simply because the advertised product is not purchased with any great regularity? Should the public be informed only about causes of action they are already familiar with, or should we open the channels of communication to the public and inform them about less known causes of action recognized by the law?

Yet, now, the State Bar contradicts this reasoning by arguing that "[n]othing in the advertisement provides a reference point for what Sharon S. might consider a 'nice award.' " Brief of Appellee, p. 81. Certainly, this "Catch 22" argument, and the many others which the State Bar propounds in its brief, demonstrate the difficulties an accused attorney would encounter in sustaining the burden of proving that his advertisement is not false, deceptive or misleading.

The other arguments of the State Bar are equally unimpressive. For example, their argument that "[l]awyers seldom 'immediately take the case' " (Brief of Appellee, pp. 84-85), fails to consider that the advertisement stated that Sharon S. was *rear-ended* and that her *medical bills were piling up*. It is hereby submitted that few, if any, personal injury lawyers would refuse to immediately take a case where a potential client was rear-ended and had substantial medical bills.

In any event, the public is far better off seeing an attorney for a free consultation because of an accident or because they were harassed by an insurance company than not seeing an attorney at all, especially since personal injury actions are typically taken on a contingency basis. Perhaps this is one reason why this Court has stated that, even if advertising is incomplete, the receipt of some information is better than the receipt of no information at all. *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562; *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977).

III.

EXPERIENCE HAS SHOWN TESTIMONIAL ADVERTISING TO BE HELPFUL, RATHER THAN DETRIMENTAL, TO THE PUBLIC.

Recently, testimonial advertising was examined in Brown, *Advertising in the "Learned Professions": The Case for Price Comparisons and Testimonials*, 11 *S.Ill.Univ.L.J.* 1205 (1987). In concluding that testimonial advertising is helpful to the public and should be permitted, Brown states:

> "Consumers are genuinely interested in hearing the opinions of those who have used the services of a particular lawyer or doctor. A statement by a satisfied client, 'I went to the Law Office of Smith and Brown and found their service to be very good and their prices quite reasonable,' is arguably no more misleading than an ad which lists prices. Certainly, the individual needs of a particular client may make the services of a particular lawyer more suitable. *Consumers, however, are capable of determining the value of an endorsement and of recognizing that the statement is merely the opinion of a presumably satisfied client. A paternalistic, prophylactic approach by government which attempts to insulate the consumer from potentially misleading advertisements is both unnecessary and arguably unconstitutional.*" Emphasis added.

Further, the asserted dangers of deceptive advertising by attorneys are greatly exaggerated. As stated by Federal Trade Commissioner Terry Calvani, et al., in *Attorney Advertising and Competition at the Bar*, 41 *Vand.L.Rev.* 761, 777 (1988):

> "[A]dvertising may actually reduce consumer deception and improve the ability of consumers to evaluate the quality of legal services. In particular, advertising can induce customers to seek additional information about the lawyer through other sources, which reduces the likelihood of consumers being deceived by advertising. Additionally, advertising may reduce the incentive for firms to run deceptive advertisements. Because advertising encourages consumers to learn more about the firm, attorneys who advertise realize that they will develop a negative reputation by making false or misleading claims."

See, also, Kuehl and Ford, *The Promotion of Medical and Legal Services: An Experimental Study*, Contemporary Marketing Thought: 1977 Educator's Proceedings 39-44 [*content* of advertising not as important as exposure to *alternative sources* of advertising]. Thus, all advertising, including testimonial advertising, encourages discussion by consumers and induces them to seek additional information. If the advertisement can be substantiated, by, for example, a personal friend or known professional, then a consumer is much more likely to act upon it. Kuehl and Ford, *supra*.

Surveys have also demonstrated the public's need to know is substantially more important to them than is the need to be protected from advertising. Linenberger and Murdock, *Legal Service Advertising: Wyoming Attorney Attitudes Compared With Wyoming Consumer Attitudes*, 17 *Land and Water L.R.* at 223-224 (1982). Consumers believe that the control of advertising lessons competition among attorneys and results in higher prices. Additionally, they are dissatisfied with existing sources of information. *Id.* at 229. And consumers believe that advertising would "weed out the bad lawyers and make the profession more reputable." *Id.* at 238. Certainly, the public's opinions concerning advertising demonstrate that existing sources of information are inadequate and support the need for testimonial and other forms of advertising.

Even the State Bar has cited authority to the effect that "the same standards apply to testimonial statements

as to any other advertising claim." Brief of Appellee, p. 42, citing Caffey and Kaufman, *The Laws of Advertising in Franchising*, 412 PLI/Comm. 689, 702 (1987). Yet, the presumption invoked against Appellant treats testimonials differently.

Certainly, the Federal Trade Commission rules cited by the State Bar are "instructive." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 649. But, unlike the State Bar which benefits from this presumption, even the F.T.C. must sustain the burden of proving that testimonials are false, misleading or deceptive. See *Simeon Management Corporation v. Federal Trade Commission*, 579 F.2d 1137, 1144 (9th Cir. 1978).[6]

The State Bar's arguments seem to be grounded on the argument that it is better to present less, rather than incomplete, information. But this Court has already discarded such an argument, stating:

> "[t]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect this argument rests on an underestimation of the public. *If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." Bates v. State Bar of Arizona*, 433 U.S. at 374-375; emphasis added.[7]

[6] In *Zauderer*, 471 U.S. at 646, n. 13, this Court noted that the American Bar Association "shares the view that weeding out false or misleading advertising by attorneys from advertising that is accurate and nonmisleading is neither impractical nor unduly burdensome" and that the F.T.C. has concluded that "application of a 'false or deceptive' standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally." Why, then, should the State Bar be entitled to a less onerous burden than the F.T.C.? Logic and the importance of First Amendment protection dictate otherwise.

IV.

THE STATE BAR RULE, WHICH PRESUMES THAT TESTIMONIALS ARE FALSE, MISLEADING OR DECEPTIVE, IS (A) BROADER THAN REASONABLY NECESSARY AND (B) VIOLATES DUE PROCESS.

A. THE PRESUMPTION IS BROADER THAN REASONABLY NECESSARY TO PREVENT THE PERCEIVED EVIL.

The fact that the State Bar has proposed new standards, which would eliminate the presumption that testimonial advertising is misleading so long as a disclaimer is included, is evidence that even the State Bar realizes that the presumption at issue here is not the least restrictive means available to serve the governmental interests at stake. Joint Appendix "C," p. 10. Perhaps the State Bar has proposed this new rule because this Court has emphasized that disclosure requirements "trench more narrowly on an advertiser's interests" and are a more preferred remedy. *Zauderer*, 471 U.S. at 651. Undoubtedly,

[7] And the State Bar's reference to *Friedman v. Rogers*, 440 U.S. 1, 13 (1979), where this Court held that a state could prohibit the practice of optometry under a trade name, is inapposite for several reasons. First, unlike testimonials which do provide information to the public, trade names have no intrinsic meaning because they convey "no information about the price and nature of services offered . . . " 440 U.S. 12. Second, substantial *evidence* was introduced which demonstrated the deceptive uses of trade names. 440 U.S. 15, n. 13.

the new standards proposed by the State Bar are narrower than the presumption at issue and demonstrate that there is a less burdensome alternative.[8]

The State Bar's contention that the presumption simply requires more and not less information to be presented in an advertisement (Brief of Appellee, pp. 59-64), is illogical. This presumption does not require any disclosure at all; it simply states that no matter what is disclosed, an attorney who utilizes testimonial advertising must demonstrate that such advertising is not false, misleading or deceptive. Again, if, as the State Bar contends, this demonstration is such a "simple matter" (Brief of Appellee, p. 63), the Bar should have no objection to assuming the burden of proof, as the First Amendment commands. *Zauderer*, 471 U.S. at 646 ["the free flow of commercial advertising is grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."].

B. THE PRESUMPTION VIOLATES DUE PROCESS.

The State Bar has failed to address Appellant's contention that the presumption at issue cannot stand under the rules set forth in *Speiser v. Randall*, 357 U.S. 513 (1958) and its progeny. Since "the man who knows that he must bring forth proof and persuade another of the lawfulness

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[8] And, of course, this Court has mentioned that a preliminary screening of the advertisement by the Bar is a less burdensome means of preventing false, misleading or deceptive advertising. *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916, 1924 (1988).

of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens" (*Id.* at 562), the presumption at issue effectively operates as an outright ban. Brief of Appellant, pp. 41-45. But as stated in *In re R.M.J.*, 455 U.S. 191, 203 (1982), "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive."

The State Bar's contention that this is a "civil" matter and, therefore, the "constitutional validity of presumptions affecting the burden of proof is whether a rational connection exists between the fact proved . . . and the presumed fact . . . " (Brief of Appellee, p. 65) is patently wrong for several reasons. State Bar disciplinary matters are *quasi-criminal, not civil. In re Ruffalo*, 390 U.S. 544, 551 (1968).

Additionally, under California law, the presumption that testimonial advertising is false, misleading or deceptive is a mandatory presumption. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). The effect of the presumption is as follows: Once the State Bar demonstrates that the advertisement is a testimonial, unless the accused attorney introduces evidence demonstrating that the testimonial is not false, deceptive or misleading. 2 Jefferson, *California Evidence Benchbook* (2d Ed. 1982), Section 46.3. As stated in *McCandless v. Beyer*, 835 F.2d 58, 60 (3d Cir. 1987):

> "In assessing the constitutionality of a mandatory presumption, a court must determine whether the coincidence of facts is *compelled* by the course of human experience. See *Ulster County Court v. Allen*, 442 U.S. 140, 159-60, 99 S.Ct. 2213, 2226, 60 L.Ed.2d 777 (1978)." Emphasis added.

Certainly, the authorities cited herein and in the Brief of Appellant demonstrate that the alleged misleading nature of testimonial advertising is *not* a conclusion compelled by the course of human experience and is *not* even "more likely than not." *Leary v. United States*, 395 U.S. 6, 36 (1969). In any event, the State Bar has failed to present "available, pertinent data" which supports the rationality of the presumption. *Id.* at 38.

V.

THE ADVERTISEMENT IN QUESTION, UNLIKE THE USUAL COMMERCIAL MESSAGE, DID NOT SEEK TO INDUCE THE PURCHASE OF A PRODUCT OR SOLICIT THE IMMEDIATE RETENTION OF A LAWYER. IT MERELY INVITED THE CLIENT TO COME TO THE LAWYER'S OFFICE FOR A FREE CONSULTATION, WHERE ANY AND ALL QUESTIONS WOULD BE ANSWERED.

The advertisement involved in this case did not have the potential for abuse as most commerical advertisements. Most advertisements seek to induce the reader or listener to go to a store and make a purchase. The consumer usually makes the choice based on nothing more than the information contained in the ad, and nothing stands between the information contained in the ad and the purchase itself.

Here, the prospective consumer was afforded a much greater measure of protection. Oring's ad, as best it could in the limited amount of time allowed for a radio commercial, advised listeners that if they had an automobile accident or if they were harassed by an insurance company thereafter, they could have a *free* consultation. Thus, unlike most commercial messages which induce a purchase directly, Oring's message offered a free consultation at which time all the applicable facts and law could be fully discussed with the potential client and any and

all questions could be answered. It was the free consultation with the potential client that was of far greater importance than the ad which brought him there.[9] If, at the consultation, there were any falsehoods, misrepresentations or failures to disclose information, the lawyer would then not only be justifiably subjected to disciplinary proceedings but liable to an action for malpractice or fraud.

VI.

SINCE THE STIPULATIONS ENTERED INTO BETWEEN ORING AND THE STATE BAR WERE NOT ADHERED TO BY THE STATE BAR AND THE RECOMMENDED DISCIPLINE WAS REJECTED AND, IN FACT, INCREASED, APPELLANT CANNOT HAVE WAIVED HIS RIGHT TO APPEAL. FURTHER, THE STATE BAR'S OWN ACTIONS IN ADVISING ORING THAT HE COULD SEEK REVIEW PRECLUDE THE BAR FROM CONTENDING THAT REVIEW WAS WAIVED.

The State Bar contends that Oring may not prosecute this Appeal because he entered into two stipulations (Jurisdictional Statement Appendix "D," pp. 8-11; Jurisdictional Statement Appendix "E," pp. 12-13) and because the California Supreme Court did not impose

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[9] Contrast the ad here, which invited the listener to come in for a free consultation at a time to be chosen by the listener, with the conduct of the lawyer in *Ohralik v. Ohio State Bar Association*, 436 U.S. 445 (1978) who appeared uninvited at the home of an injured 18 year old girl, and obtained her beside authority to represent her after previously having obtained a hospital-bed retainer agreement from another 18 year old who was then lying in traction.

greater discipline than was stipulated to by the parties. Brief of Appellee pp. 85-92.[10]

The State Bar, itself, failed to honor the stipulations and adhere to the recommended discipline. The first stipulation dated December 5, 1984 (Jurisdictional Statement Appendix "D," pp. 8-11) provides, in paragraph "D" that "[i]t is *recommended* that Respondent Mark Oring be *admonished* . . . " Emphasis added.[11]

Thus, the State Bar did not abide by the terms of the Stipulation and indeed notified Oring that he was publicly reproved and that he could seek review by the California Supreme Court (Joint Appendix, "E", pp.

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[10] The Brief for Appellee fails to address the fact that courts indulge in every reasonable presumption against waiver of fundamental rights and that under California law counsel cannot waive appeal rights on behalf of a client. Brief of Appellant pp. 45-46. Moreover, neither the record nor the stipulations express the fact that Oring was giving up his right to review. Presuming waiver from a silent record is impermissible. *Carnley v. Cochran*, 369 U.S. 506 (1962).

[11] Both the Brief of Appellant and the Brief of Appellee are in error with respect to the langauge of the Stipulation. Appellant's Brief at p. 8 errs in stating that "[T]he parties agreed to a punishment consisting of a public reproval . . . " Appellee's Brief at p. 90 states that "[T]he California Supreme Court did not impose greater discipline than was stipulated by the parties." As a matter of fact, the stipulation provided for an "admonition" and not a "public reproval", which, as we shall demonstrate, is a more professionally devastating form of discipline.

18-19).[12] It should, therefore, be estopped to claim that Oring waived or abandoned his right to appeal either to the Supreme Court of California or to this Court.

Moreover, even assuming, *arguendo*, that the State Bar did impose the discipline that the parties had bargained for in the stipulation, Oring does not, as the State Bar claims, seek to evade or escape from his stipulations. Of course, he is bound by the factual stipulations. He has never sought to deny the *facts* stipulated therein, i.e., the words of the advertisement itself and the *fact* that it was truthful. He merely seeks, as any attorney may seek, review of the cause. The State Bar's reliance upon *Duggan v. State Bar*, 17 Cal.3d 416 (1976), *Giovanazzi v. State Bar*, 28 Cal.3d 465 (1980) and *Innis v. State Bar*, 20 Cal. 3d 552 (1978) (Brief of Appellee, p. 90) is grossly misplaced and Appellee's Brief misstates the holdings of those cases. *Giovanazzi* and *Innis* are very explicit in holding that an attorney is bound by *factual* recitals in a stipulation, and that the stipulated *facts* may not be contradicted. 28 Cal.3d 465 at 470; 20 Cal.3d 552 at 555. Yet the right to

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[12] While an "admonition" shall otherwise not be made public and does not constitute imposition of discipline upon a lawyer, (Rules of Procedure of the State Bar, Rule 415) the "public reproval" which ultimately was administered, does constitute discipline against the lawyer, may be made public, and is published in "California Lawyer" for the entire profession to see (Rules of Procedure of the State Bar, Rule 615). Thus, a "public reproval" could adversely affect one's chances for a judicial appointment while an "admonition" cannot. Additionally, the "public reproval", unlike the "admonition", subjects the lawyer to more severe sanctions in the event of any subsequent discipline. *Rules of Procedure of the State Bar, Standards for Attorney Sanctions for Misconduct*, Standards 1.7(a) and 1.7(b); Brief of Appellant, p. 42.

seek review was not foreclosed in *Duggan*, *Giovanazzi* or *Innis*, and indeed review was granted in each of those cases and the issue of culpability and punishment were discussed and decided by the California court.

In *Duggan*, the lawyer stipulated that his conduct involved "moral turpitude," and the Court held that, in State Bar proceedings, stipulations "are conclusive as to the *facts* contained therein." 17 Cal.3d 416 at 422; emphasis added. It also conducted its own independent review of Duggan's conviction which compelled it to hold that Duggan's crime had involved moral turpitude. Again, review was not foreclosed in *Duggan*.

Most recently, in *Smith v. State Bar*, 38 Cal.3d 525, 535 (1985), the California Supreme Court stated "[w]hen this court is considering harsher discipline 'fundamental fairness seems to require us to relieve an attorney from the legal conclusions to which he may have agreed . . . ' "

Since harsher discipline than that recommended by the stipulations was imposed, Appellant should be, and is, relieved from the legal conclusions that he agreed to.

Finally, since it is clear that the Hearing Panel of the State Bar can only *recommend* discipline to the Review Department of the State Bar Court, which in turn can only *recommend* discipline to the Supreme Court, a lawyer cannot logically be expected to have waived the right to review discipline, the exact degree and severity of which was not yet known at the time that the stipulations were entered into.[13]

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[13] There was thus never any reason for Oring to seek to have the stipulations set aside as the State Bar claims he should have done. Brief of Appellee, pp. 91-92. Since the stipulations were binding only as to the *facts*, and not as to the question of whether discipline was warranted or, if so, the nature and extent thereof, the question of discipline always remained open to review.

VII.

CONCLUSION

The State Bar's position, if upheld by this Court, would represent a radical departure from the long-established constitutional principles governing commercial speech.

Most fundamentally, the State Bar challenges the essential First Amendment and due process protections recognized in *Speiser v. Randall* and reaffirmed in *Friedman v. Maryland*, 380 U.S. 51 (1965) and more recently in *Zauderer*, that the burden of proving speech unprotected must be assumed by the would-be regulator or censor. The contrary rule, advocated by Appellee, operates to chill and deter protected speech, to the detriment of the free flow of ideas and information.

The State Bar's purpose of protecting the public from false, misleading or deceptive attorney advertising is a laudable goal. In adopting the amended version of this regulation, which allows the attorney-advertiser to avoid this onerous presumption by adding a small disclaimer, the State Bar has acknowledged that its perfectly legitimate interest may be achieved by a less restrictive means. The presumption applied to Oring, in contrast, both violates the constitutional requirement of narrowly-tailored regulation of speech, and disserves the public interest. Appellant therefore respectfully urges this Court to declare this presumption invalid under the First and Fifth Amendments and to reverse the judgment below.

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Respectfully submitted,

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